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No. 81-122

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VALLEY NEWS

Petitioner,

v

JAMES F. McCUSKER

Respondent.

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND AMERICAN SOCIETY OF NEWSPAPER EDITORS FOR LEAVE TO FILE *BRIEF AMICI CURIAE* AND *BRIEF AMICI CURIAE*

RICHARD M. SCHMIDT, JR.
COHN AND MARKS
1333 New Hampshire Ave.
N.W., Suite 600
Washington, D.C. 20036

Attorney for Amicus Curiae
American Society of
Newspaper Editors

ARTHUR B. HANSON
FRANK M. NORTHAM
MITCHELL W. DALE
ARTHUR D. McKEY

HANSON, O'BRIEN, BIRNEY &
BUTLER
888 Seventeenth Street, N.W.
Suite 1000
Washington, D.C. 20006

Attorneys for Amicus Curiae
American Newspaper
Publishers Association

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The American Newspaper Publishers Association (hereinafter "ANPA") and the American Society of Newspaper Editors (hereinafter "ASNE") respectfully move this Court for leave to file the accompanying Brief Amici Curiae in support of the Petition for Writ of Certiorari filed herein. Although the attorneys for Petitioner have consented to ANPA's and ASNE's filing of a brief amici curiae, the Respondent has withheld his consent to such a filing.

ANPA is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,400 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States. The *Valley News* and seven other

newspapers published in various parts of New Hampshire hold membership in ANPA.

Concerned with issues of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members informed of, and to provide meaningful input on, matters touching on these concerns. The Association's member newspapers, individually and through ANPA, are ever vigilant to protect the public's right under the First Amendment to information concerning the activities of government and matters of public interest.

The American Society of Newspaper Editors (hereinafter "ASNE") is a nationwide, professional organization of more than 850 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The decision of the New Hampshire Supreme Court in the instant case, while possibly an aberration, represents a serious departure from established libel jurisprudence and, therefore, is of significant interest to the members of ANPA and ASNE, all of whom cherish their right and their duty to inform the public on political matters.

No decision of this Court has ever suggested that the determination of the public official/public figure issue in a libel case might properly be made by a jury, even when this Court has disagreed with the conclusion of a lower court concerning the "voluntary" nature of a defamation plaintiff's involvement in a public controversy. *See, e.g., Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979). On the contrary, this Court uniformly has treated the question as a legal issue. *See, Rosenblatt v. Baer*, 383 U.S. 75 (1966) (Public official issue is for the trial judge). Such uniform treatment strongly suggests that this Court considers such treatment to be an element of the

"strategic protection" provided by the First Amendment in defamation actions. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

Yet, in the instant case, the New Hampshire Supreme Court held that the Respondent's status as a public official was a question for the jury. While, as noted, this decision may be an aberration, it is not the only state court decision which recently has so held. See *Penthouse International Ltd. v. Rancho La Costa, Inc.*, 106 Cal. App. 3d 646 (Cal. Ct. App. 1980), cert. denied, ____ U.S. ____, 67 L.Ed2d 326 (1981).

By holding that the public official determination is a matter for the jury, the New Hampshire Supreme Court has made it impossible for any media defendant in New Hampshire to obtain a pre-trial adjudication of that particular issue and, thereby, has inordinately added to the discovery and trial burdens of both sides in libel litigation.

Obtaining a pre-trial adjudication of the applicability of the First Amendment privilege is, of course, vitally important to media defendants. An early determination of the privilege issue defines the parameters of both the trial of the action—*i.e.*, whether the defendants will have the considerable protection of the *New York Times* actual malice standard—and pre-trial discovery. Indeed, it is necessary to define those parameters at an early stage of litigation in order to enable the trial judge to provide the type of sensitive control over pre-trial discovery issues which this Court has encouraged. See *Herbert v. Lando*, 441 U.S. 153 (1979).

Moreover, in the absence of the availability of pre-trial adjudication of a libel plaintiff's "status", the standard of liability (i.e., "actual malice" or a "private individual" standard) to be applied at trial will be unknown. This will require both plaintiffs and defendants to prepare and present much lengthier cases and much more evidence than would be necessary if the applicable standard of liability were known. In essence, each side will have to present two complete cases: one focusing on public official/public figure status and one focusing on private individual status.

Because of the burdens entailed in libel litigation wherein the plaintiff's "status" is left to the jury and because the New Hampshire Supreme Court's decision is contrary to the uniform treatment accorded public official/public figure issues in this Court, ANPA and ASNE wish briefly to set forth their views for the assistance of the Court.

WHEREFORE, the American Newspaper Publishers Association and the American Society of Newspaper Editors request this Court to grant this motion and permit them to file the Brief Amici Curiae attached hereto.

Respectfully submitted,

RICHARD M. SCHMIDT, JR.
COHN AND MARKS
1333 New Hampshire Ave.
N.W., Suite 600
Washington, D.C. 20036

Attorney for Amicus Curiae
American Society of
Newspaper Editors

ARTHUR B. HANSON
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ARTHUR D. MCKEY

HANSON, O'BRIEN, BIRNEY &
BUTLER
888 Seventeenth Street, N.W.
Suite 1000
Washington, D.C. 20006

Attorneys for Amicus Curiae
American Newspaper
Publishers Association

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PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") and the American Society of Newspaper Editors (hereinafter "ASNE") submit this brief amici curiae in support of Petitioner's, *Valley News*, Petition for Writ of Certiorari.

INTEREST OF THE AMICI CURIAE

As set forth in their motion for leave to file this brief, ANPA and ASNE have a significant concern for insuring that the First Amendment's guarantee of a free press shall not be abridged. This Court, in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), established that the First Amendment mandated a constitutional privilege applicable to allegedly libelous publications concerning "public officials". Under that constitutional privilege, if a libel plaintiff could be classified as a "public official", then he was required to prove "actual malice" in order to recover in defamation litigation. In *Rosenblatt v. Baer*, 383 U.S. 75 (1966), the Court also established that the

classification of libel plaintiffs as public officials/public figures or private individuals was a constitutional question resolvable only by the court.

In the case before the Court, the New Hampshire Supreme Court ruled that the public official question was a matter to be decided by the jury. It should be noted that the plaintiff in this case was the sheriff of Sullivan County, an elective office, from 1943 to 1966. At the time of the publication in question, he was a deputy sheriff under an appointment of his brother, then the sheriff. In his capacity as deputy sheriff, the plaintiff's duties consisted of serving process, interviewing complainants, doing investigative work, and acting as bailiff for the superior court. The plaintiff has served as president of the New Hampshire Sheriff's Association. In 1955, he organized the Sullivan County Peace Officers' Association. In the late 1930's, he was the president of the Permanent Fireman's Association, and in 1939 he authored a legislative bill providing for firemen's retirement. He has been active over the years in political campaigns and has spoken to service and women's clubs.

It is incredulous that any court, paying any attention to what this Court has said in this field, could make the findings made by the New Hampshire Supreme Court. It is obvious that this Respondent is a public official and that no court should abnegate its responsibility to a jury for a ruling in a case of this nature. Since the decision of the New Hampshire Supreme Court is so contrary to the law as settled by this Court and followed by the lower federal and state courts, ANPA and ASNE desire to present to this Court, for its assistance, their views in respect to the important issues placed before this Court by the Petition for Writ of Certiorari.

ARGUMENT

THE ISSUE AS TO A LIBEL PLAINTIFF'S PUBLIC OFFICIAL/PUBLIC FIGURE STATUS IS A QUESTION OF LAW NOT APPROPRIATE FOR CONSIDERATION BY A JURY.

In the instant case, the New Hampshire Supreme Court affirmed the trial court's determination that the question as to whether the Respondent was a public official was a matter for determination by the jury at trial. Not only is this decision contrary to the opinions of the vast majority of courts which have addressed this issue, but it is also contrary to the uniform treatment accorded the issue in this Court.

Both the trial court and the New Hampshire Supreme Court concluded that there existed genuine issues of material fact with respect to Respondent's status as a public official and, therefore, that Petitioner was not entitled to summary judgment. Yet, neither court was able to point to any fact which was in dispute. Indeed, the recitation of the Respondent's official positions and duties by the New Hampshire Supreme Court (Petition for Ceriorari, Appendix at 7a) is without qualification and represents the undisputed facts which were before the court. A close reading of the New Hampshire Supreme Court's opinion demonstrates that the court suffered from the misapprehension that summary judgment in libel cases could only be had where there were no disputed facts as to *any* issue and complete judgment could be entered for one of the parties. Analysis of this Court's decisions and numerous state and federal decisions demonstrates that partial adjudication, *by the court*, on the public official issue is the rule and is a question which "should be answered as soon as possible" in defamation cases. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 724 (5th Cir. 1980), *cert. denied*, ____ U.S. ____, 68 L.2d 238 (1981).

The rule was first announced by this Court in *Rosenblatt v. Baer*, 383 U.S. 75 (1966). There, this Court reversed a jury verdict which had been rendered prior to the landmark decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In

attempting to provide some guidance to the trial court on remand concerning the public official issue, this Court held: "it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official' ". 383 U.S. at 88. On numerous occasions since *Rosenblatt*, this Court has ruled on the public official/public figure issue, as a matter of law, even in cases which had not yet gone to trial. See e.g., *Wolston v. Readers Digest Ass'n, Inc.*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). In none of these cases has the Court suggested that resolution of the public official/public figure question should be left to the jury, as did the New Hampshire Supreme Court in the instant case. The consistent approach of this Court in ruling on public official/public figure questions as a matter of law reflects this Court's inherent approval of the rule that such questions must be decided by the trial judge and not the jury.

This also is the rule which has been announced and followed by virtually all federal and state courts which directly have addressed the question. See, *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859, 862 (5th Cir. 1978) and cases cited therein. Especially in cases where the facts are undisputed as to a libel plaintiff's "status", the courts have held that summary judgment is appropriate; and, it has been suggested that "[e]ven if summary judgment were improper because of issues of fact that could only be resolved after evidentiary hearing, the trial court, not a jury, must determine whether the evidence showed that plaintiff was a public figure." *Rebozo v. Washington Post Co.*, 637 F.2d 375, 379 (5th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3023 (U.S. July 27, 1981) (No. 81-173); see also, *Burns v. The Times Argus Association, Inc.*, 430 A.2d 773 (Vt. 1981) (libel plaintiff's "status" is a "constitutional" issue which must be decided on motions for summary judgment or directed verdict).

The reasons for withdrawing public official/public figure inquiries from the jury are twofold: first, under *New York Times v. Sullivan, supra*, the public official issue is a constitutional question which may only be resolved by the court; second, "[s]uch a course will both lessen the possibility that a jury will

use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions." *Rosenblatt v. Baer, supra* at 88, n.15. Not only does resolution of the constitutional question by the court guard against the unreviewable effects of possible jury prejudice, but it also avoids the problem of forcing a jury to make the decision without the opportunity (available to a judge) to sift through the reported cases and consider the particular facts and nuances of the various statements of the standard. As noted by the United States Court of Appeals for the District of Columbia Circuit:

> [A] jury of laymen is hardly qualified to apply the nice and sometimes intricate distinctions between public and private figures which have been developed in the cases following *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Application of those rules and distinctions is analagous to a court's ruling on the question of probable cause for a search and seizure, a matter which of course is for the court and not the jury.

Wolston v. Reader's Digest Ass'n, Inc., 578 F.2d 427 (D.C. Cir. 1978), *rev'd. on other grounds*, 443 U.S. 157 (1979).

The New Hampshire Supreme Court failed to pay heed to the constitutional nature of the public official/public figure issue and also ignored the important policy considerations underlying the rule that this particular issue must be decided by the court and not the jury. This error of the New Hampshire Supreme Court was compounded by its failure to hold that Respondent is a public official as a matter of law.

THE RESPONDENT, A LAW ENFORCEMENT OFFICER, WAS A PUBLIC OFFICIAL AS A MATTER OF LAW

Lying at the very core of the values protected by the First Amendment is the notion that debate on significant public issues and government affairs should be "uninhibited, robust,

and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940). *See generally* A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1965). As Justice Brandeis noted, those who won our independence believed that "public discussion is a political duty; and this should be a fundamental principle of American government." *Whitney v. California*, 274 U.S. 357, 375 (1927) (concurring opinion). Recognizing that the right to criticize the activities of the government is inseparable from the right to criticize the actions of public officials, this Court in *Sullivan* imposed the stringent standard of "actual malice" on public officials who sought to recover in libel for defamatory false statements directed against them.

The decisional authorities of this court and of numerous state and federal courts leave no doubt that law enforcement officiers must be considered public officials within the purview of *New York Times v. Sullivan*. The plaintiff in that landmark case was a city commissioner who was charged with supervising the police department.

Since *New York Times*, it has been judicially recognized that police officers bear a unique responsibility to the public. They are charged with the gravest public trust—that of executing the law. They are the quintessence of state action, affecting the public on the most elemental level. They are required to physically apprehend suspects. Most are armed and they are all too frequently called upon to utilize deadly force in the line of duty. Their conduct affects the very lives of the populace. They clearly "have or appear to have, substantial responsibility for the conduct of government affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1965).

Because of their unique position in the American system of government, police officials must be subject to the highest degree of scrutiny. The public and the press must be free to critize their conduct within the limits of the "actual malice" rule.

This Court implicitly recognized this principle in *St. Amant v. Thompson*, 390 U.S. 727 (1968). There, as here, the plaintiff

was a deputy sheriff. This Court adopted, without comment, the ruling of the lower court that a deputy sheriff was a public official within the scope of the definition established in *Rosenblatt*.

In *Henry v. Collins*, 380 U.S. 356 (1965), this Court again accepted without question the legal determination of the lower court that the plaintiff, a chief of police of the small community of Clarksdale, Mississippi, was a public official.

Following the lead of the Court, the lower federal and state courts have spoken virtually with one voice in holding that law enforcement officers are public officials as a matter of law. In *Pape v. Time, Inc.*, 354 F.2d 558 (7th Cir. 1965), *cert. denied*, 384 U.S. 909 (1966), the Seventh Circuit rejected the argument that only elected officials should be required to show actual malice. The court relied on *Henry v. Collins, supra*, in holding that a deputy chief of detectives and lieutenant of police was a public official.

The Seventh Circuit addressed this question again in a more recent case. In *Meiners v. Moriarity*, 563 F.2d 343 (7th Cir. 1977) the court ruled that:

> Where a position in government has such apparent importance that the public has an independent interest in the qualification and performance of the person who holds it, beyond the general public interest in all government employees, . . . the *New York Times* malice standard applies.

563 F.2d at 352, *citing, Rosenblatt v. Baer*, 383 U.S. at 83.

The court went on to hold:

> The public is certainly interested in an important and special way in the qualifications and performance of federal agents, such as defendants here, where decisions to search and to arrest directly and personally affect individual freedoms. We need not fear, as the defendants contend, that holding them to be public

> officials will make the terms 'public official' and 'government employee' synonymous. Each case will have to be decided on its own facts . . .

563 F.2d at 352.

The Court in *Meiners* clearly recognized the unique position occupied by law enforcement officers and the vital public interest in their performance in office.

Perhaps the strongest and most articulate judicial statement concerning the public official status of police officers appears in an opinion by the Tenth Circuit, decided on August 7, 1981.

> We agree with the trial court that Gray's status as a police officer in Rock Springs made him a public official. Street level policemen, as well as high ranking officers, qualify as public officials under the test of *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966). They "have or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs," *id.* at 85, and their position "has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees. . ." *Id.* at 86. The cop on the beat is the member of the department who is most visible to the public. He possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss. The strong public interest in ensuring open discussion and criticism of his qualifications and job performance warrant the conclusion that he is a public official.

Gray v. *Udevitz*, No. 79-1739, slip op. 8-9 (10th Cir. Aug. 7, 1981).

The vast majority of state courts have similarly held that law enforcement officers at all levels are "public officials"

within *New York Times*. In *McClain v. Arnold*, 270 S.E.2d 124, 125 (S.C. 1980), the Supreme Court of South Carolina held:

> . . . [T]he status of a public official may be deemed sufficient to warrant application of the *New York Times* privilege, not because of the government employee's place on the totem pole, but because of the public interest in a government employee's activity in a particular context. *Fadell v. Minneapolis Star Tribune Co., Inc.*, 425 F. Supp. 1075, 1083 (N.D. Ind. 1977), *affirmed*, 557 F.2d 107 (7th Cir. 1976); Handbook of Free Speech and Free Press by Barron & Dienes, page 275. Accordingly, we hereby join the majority of jurisdictions which have denominated police officers as "public officials" within the meaning of the *New York Times* doctrine.

There are several cases specifically holding that a deputy sheriff is a public official. The most recent also emanates from South Carolina. In *Phillips v. Independent Publishing*, the court discussed with particularity the public official status of a deputy sheriff stating:

> Directly on the point, holding that a deputy sheriff is a public official and therefore within the *New York Times* rule, see *Ammerman, et al. v. Hubbard Broadcasting, Inc.*, et al, 572 Pac. Reporter 2d 1258 (1977): The Court held that a deputy sheriff is a public officer, especially where he takes an official oath of office. South Carolina requires a similar oath by Section 23-13-20, South Carolina Code of Laws, 1968. In addition, Section 23-13-50 states that deputies may perform any and all duties appertaining to the office of his principal.

5 Med. L. Rptr. 1597, 1599 (S.C. Ct. of Common Pleas, 1979).

In another recent North Carolina case, the Court held as follows:

> The deputy is a representative of the sheriff in his official capacity. He is a public officer whose authority and duties are regulated and prescribed by law.

> The public generally regards the acts of a deputy sheriff as the acts of the sheriff himself. The sheriff's position in government vests in him and his deputies 'substantial responsibility for or control over the conduct of governmental affairs'. This is certainly true where law enforcement and police functions are concerned. Additionally, though the office of deputy sheriff may be a comparatively low ranking one in the hierarchy of government, nevertheless, if the deputy's office be abused, it has great potential for social harm and thus invites independent interest in the qualifications and performance of the person or persons who hold the position.

Cline v. Brown, 210 S.E.2d 446, 449 (N.C. App. 1975).

A number of other courts have held that police officers clearly constitute public officials within the *Rosenblatt* formulation. In *Gilligan v. King*, 48 Misc.2d 212, 264 N.Y.S.2d 309, (1965), an off-duty police lieutenant who shot a person, allegedly in self-defense after seeing the injured person pursuing a third party with an open blade, was held to be a public official. The court stated: "It is not the title of his office but the duties with which the particular office sought to be made to respond in damages is entrusted" that provides the privilege. 264 N.Y.S.2d at 313-14 (1965).

More recently *Moriarity v. Lippe*, 162 Conn. 371, 294 A.2d 325, 330-31 (1972) held that a patrolman was a public official within the ambit of the *New York Times* rule because his position vested in him a great potential for public harm stating: "Although a . . . low-ranking governmental official, a patrolman's office, if abused, has great potential for social harm and thus invites independent interest in the qualifications and performance of the person who holds the position." 294 A.2d at 330-31.

Similarly, in *Scelfo v. Rutgers University*, 116 N.J. Super. 403, 282 A.2d 445, 449-50 (1971), the court held two mounted policemen to be public officials because of their apparent authority over the conduct of governmental affairs and the

public's dependence upon proper performance of their important functions:

> As mounted policemen of the Newark police force, plaintiffs perform governmental duties directly related to the public interest and "have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs", *Rosenblatt v. Baer*, 96 S.Ct. at 676. The alleged defamatory statements made by defendant related to the discharge of official duties of patrolmen assigned to the demonstration.

282 A.2d at 499-50.

Again, in *Coursey v. Greater Niles Township Corp.*, 40 Ill.2d 237, 239 N.E.2d 837, 841 (Ill. 1968), the court applied the foregoing principles in holding a patrolman to be a "public officer". In overruling an intermediate appellate court's determination that a patrolman, although conceded to be "an important symbol of government", was the "lowest in rank of police officials" and thus was not a public official, the Illinois Supreme Court stated:

> It is our opinion that the plaintiff is within the "public official" classification. Although as a patrolman he is "the lowest in rank of police officials" and would have slight voice in setting departmental policies, his duties are peculiarly "governmental" in character and highly charged with the public interest. It is indisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an "on the street" level than in the qualifications and conduct of other comparably low-ranking governmental employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm; hence, public discussion and public criticism directed towards the performance of that office cannot constitutionally be inhibited by threat of prosecution under State libel laws.

Your amici strongly endorse the courts' recognition of the critical distinction between the "governmental" as opposed to the "proprietary" function of law enforcement officers.*

As pointed out above, law enforcement is the most basic "governmental" function. Criticism of police conduct is therefore entitled to the highest level of First Amendment protection. While a junior government employee engaged in a purely "proprietary" activity might not be deemed a public official, the respondent, a law enforcement officer for many years, the chief such officer in his State and the bailiff of the Court of Record for both criminal and civil suits in the primary community in his state, clearly is.

Two additional cases have held that a police patrolman is a public official. See *Malerba v. Newsday*, ____ A.D.2d. ____, 4 Med.L.Rptr. 1110 (N.Y. App. 1978); *Orr v. Lynch*, 60 A.D.2d 949, 3 Med.L.Rptr. 2047 (N.Y. App. 1978).

From the foregoing, it is clear that the overwhelming weight of authority supports the proposition that all law enforcement officers, even those at the very lowest levels, must be considered public officials under *New York Times v. Sullivan*. In reaching this conclusion, this Court and other courts have universally recognized the critical governmental function performed by law enforcement officers and the grave public interest engendered as a consequence.

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* Federal courts in other contexts have recognized that the distinction has First Amendment implications. Anti-trust cases decided under the *Noerr-Pennington* doctrine have consistently held that attempts to influence "governmental" agencies are First Amendment protected while anti-competitive activities aimed at "proprietary" agencies are not. *See, e.g., George S. Witten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); *Hecht v. Pro Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971).

CONCLUSION

For the reasons stated herein and for the reasons advanced by Petitioner *Valley News*, it is respectfully urged that the Petition for a Writ of Certiorari to the New Hampshire Supreme Court be granted.

Respectfully submitted,

RICHARD M. SCHMIDT, JR.
COHN AND MARKS
1333 New Hampshire Ave. N.W., Suite 600
Washington, D.C. 20036

Attorney for Amicus Curiae American Society of Newspaper Editors

ARTHUR B. HANSON
FRANK M. NORTHAM
MITCHELL W. DALE
ARTHUR D. MCKEY

HANSON, O'BRIEN, BIRNEY & BUTLER
888 Seventeenth Street, N.W.
Suite 1000
Washington, D.C. 20006

Attorneys for Amicus Curiae American Newspaper Publishers Association